IN THE COURT OF APPEALS OF TENNESSEE
FOR THE MIDDLE SECTION, AT NASHVILLE

SENTINEL TRUST COMPANY, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, and Gary L. O'Brien, *Petitioners-Appellants*	)	No. M2005-01073-COA-R3-CV
v.	)	Davidson Equity No.04-1934-I
KEVIN P. LAVENDER, Commissioner Tennessee Department of Financial Institutions *Respondent-Appellee*	)	

Appellants' Reply Brief

By not even attempting seriously to answer any of the difficult questions and supporting argument presented by Appellants, the Appellee's brief is almost disrespectful to the Court—which takes seriously all serious questions properly raised on appeal—by exhibiting no underlying motivation and purpose in its writing but the hope that the Court will make a result-oriented decision by voting on which party to favor in the case's outcome, so that in the event this major state department should be the favored litigant its brief could become the most convenient opinion-writing resource, despite its many inaccuracies.

These impressions are accurate because ever since the nature of argument was first expounded by Aristotle—including the description of such naturally-existing concepts as presumptions, burden of proof, and burden of argument, the first obligation of every responsive argument is to acknowledge and accurately recognize the substance of the original argument, then attempt to respond to *that precise argument,* instead of responding to arguments different from those

made, such as mis-stated or straw-man arguments, or arguing points unrelated to those of the leading argument. In short, an unresponsive argument does not contribute to advancing the argument nor to helping the critical listeners decide whether the leading argument is correct or faulty.

Upon the failure of a party to an appeal to comply with the briefing requirements of Rule 27, T.R.A.P., the Courts may consider that party's position waived, a rule perhaps applied most often to failures by appellants, *Strategic Capital Resources, Inc., v. Dylan Tire Industries, LLC,* 102 S.W.3d 603 (Tenn.App., M.S., 2002), *Blair v. Badenhope,* 940 S.W.2d 575 (Tenn.App., E.S., 1996). Such rule is justifiably applicable to appellees, particularly when the appellee is the state government and the state and its representatives are at least morally obligated to show respect and deference to the law, in all its parts. After all, T.R.A.P. Rule 27(b), requires an appellee to include in briefing its responses to the points actually raised and briefed by the appellant, by its requirement that the appellee include the argument required by Rule 27(a)(7). The Attorney-General's total disregard of this requirement should impel the Court to recognize this for what it actually is: The demonstration of its **inability to respond,** because its actions throughout are based upon the clout of high office, rather than law.

Aside from important misstatements, some catalogued below, the Commissioner's argument is premised mostly upon the rule that in common-law of *Certiorari* review of a board or agency's decision based upon the record of a due-process adversarial type of hearing, that restricts the scope of review to whether there is adequate evidence in the administrative hearing record to support the decision (Brief, pp. 43-45) concluding with a quotation that a board's "erronious decision . . . or a misapplication of a principle of law, *absent more,* is not considered *illegal, arbitrary, or capricious."* (Brief, p. 45).

Such approach disregards the fact that the basis of attack here *is* the illegality and excess of authority by the Commissioner. The limited scope of review assumption is the basis of Appellee's

concentration solely upon the administrative record,[1] which is a record not of an adversarial *hearing*, but of an *investigation*. It overlooks, and does not attempt to respond to, important factors. It takes no note of the fact that, regardless of its own argument's first-blush façade of rightness based on quotations from cases reviewing administrative adversarial-hearing records, its argument is overcome by the principle that any "any [administrative] action which is not authorized by the statutes is a nullity." (Quoted, Appellant's brief, p.48).

The position also overlooks factors that *(i)* Sentinel's objection that there was no pre-seizure hearing below as required both Constitutionally and by the Banking Act as a condition precedent to validating the proposed business-destruction actions: Indeed, the State's act of seizure without hearing was based on the position that urgency justified action *without a prior due-process hearing; (ii)* the petition for *certiorari* sought the writ both under the "common-law" chapter and the "constitutional" chapter (Petition, R., I:1.), *(iii)* the writ was issued in response without restricting its authorization to any particular chapter of the Code, and where constitutional violations are alleged, it is beyond the competence of the Legislature, merely by specifying an arguably-narrow type of review (for proceedings to which that type of review is legally adequate), to deprive any trial court of its jurisdiction to remedy constitutional violations by the broader type of review, in light of the fact that the Constitution directly vests this broad "constitutional" review jurisdiction in every trial court, Constitution of Tennessee, Art. VI, § 10; *(iv)* it disregards the fact that the Legislature has directed that such review both be under Chapter 9 of Title 27, and has also directed that evidence be admitted that the Court consider it, T.C.A. § 27-9-111(b) and (d), it being within the Legislature's competence to modify both common law and statutory law (Constitution, Art. XI, § 1) not

---

[1]In most cases, *certiorari* review contemplates proceedings before a quasi judicial body in which there is a transcript of *evidence* that may be certified and reviewed by the Court, *Fallin v. Knox County Bd. of Comm'rs, 656 S.W.2d 338 (Tenn. 1983)*. Such orderly restriction has no reference to a record of this nature, of internal communications within the Department, including e-mails, whose content would have been permanently closed to Sentinel but for the *certiorari*.

constitutionally excluded from that power.

By this show of feined obliviousness to Appellants' arguments, the State pretends the non-existence of their demonstration that the uniform trust institutions' practice of funding bond-issue liquidation costs by allowing overdrafts against the common pooled fund pending complete liquidation of the "borrowing" fund's assets is the *approved practice* throughout the country as countenanced by the Federal Reserve Board (Appellants' Brief, pp. 31-38). And in regard to the performance of the advocate's and judicial duty of statutory construction, it refused to acknowledge and attempt to refute Appellants' step-by-step detailed and extensive arguments which fully accord with accepted statutory-construction law.

As to elaborate statutory construction exposition of this particular statute the State not only disregarded powerful and rational demonstrations, but rested its response upon a single provision of the amended statute, whose obvious purpose and command was that all trust companies, theretofore exempt or not, were subject to the Tennessee Banking Act, Chapters 1 and 2 of Title 45, T.C.A. § 45-1-124, codifying repetitious use of the phrase in Chapter 112, Public Acts of 1999, § 4, that the said chapters "apply to the operation and regulation of state trust companies." This clearly addresses the subjection of such companies to the entire Act, and does not address the scope or application of any powers granted by the Act over any type of company. By proper analogy, it must be recognized that each of us is subject to the entire Tennessee Code Annotated, but such recognition does not address whether the legality of any of our particular acts is addressed by any part of that code but the provisions pertinent to each individual's actions. Under every jurisdiction's law of construction, it is contrary to the law to isolate a single provision and from it construe the entire application of a writing—a will, a contract, a statute, or any other legal instrument. This is but a refusal by the Attorney-General to follow the law of statutory construction to construe this statute.

That such **does not constitute** an application of statutory construction law was held by the Supreme Court of Tennessee in a case in which eminent counsel of recognized competence made a persuasive but faulty statutory analysis on the basis of *a single statutory provision*:

"An excellent brief has been submitted in behalf of these appellants. Perhaps that brief presents about the strongest case that can be made in favor of appellants' insistence. *The fallacy* therein, this Court thinks, *is that the proviso upon which the appellants rely is isolated from the rest of the statute,* and the presentation proceeds upon that basis. 'It is not in accord with **any rule of statutory construction** to lift one sentence out from the statute and construe it alone, without reference to the balance of the statute.' *Cummings v. Sharp,* 173 Tenn. 637, 643-644, 122 S.W.2d 423, 425."
Rose v. Blewett, 202 Tenn. 153, 163; 303 S.W.2d 709, 713 (1957; emphasis added).

Thus a single sentence from the Supreme Court of Tennessee, according with statutory construction law everywhere, completely refutes Appellee's statutory-construction assumptions from the isolated T.C.A. § 45-1-124 by declaring the Commissioner's approach is contrary to this controlling body of law and is not acceptable in Tennessee courts.

To buttress Appellee's isolated T.C.A.§ 45-1-124 "statutory construction" argument, the Commissioner points to the fact that Sentinel submitted a charter-amendment application to the Commissioner under a provision governing such submissions by a "State Bank,"[2] T.C.A. § 45-2-218 (Brief, p. 58). In so arguing, the Attorney-General disregarded the fact that a statute applying *only to state Trust Companies, not banks,* T.C.A. § 45-2-1012, requires that when a state trust company desires to change the location of one of its offices, as occurred here, the "state trust company shall apply to the commissioner to change its location or the location of any of its offices *pursuant to § 45-2-218."* (Emphasis added). This provision, requiring a trust company to follow a statute applicable by its terms only to state banks, was inserted in the Banking Act by Public Acts of 1999, ch. 112, § 10, again recognizing that the Legislature did not intend that it did not intend that the Banking Act be further amended by substituting for the word "bank" the term "bank or trust company" wherever it appears within the Act, or wherever the Commissioner may be ambitious to

[2]This implies that Sentinel viewed itself as a state bank, though lay persons' (and even lawyers') unreasoned guesses about the meaning of a statute are not relevant to the task of following the law of statutory construction.

exercise some of his banking powers over a trust company.

Other aspects of Appellee's argument brand it as the product of clutching at any straws that have the first-blush appearance of supporting the desired construction: Appellee mis-states the quality of the argument by asserting that instead of concentrating solely on the provision to which they desire to restrict the Courts' attention, subjecting trust companies to the entire Banking Act, these Appellants "focus *solely* on the definition of 'state bank' *to the exclusion* of all other provisions of the Bank Act."(Brief, p. 51; emphases added). Not true. Appellants have consistently pointed out the absolute inconsistency of the entire Banking Act with the position asserted by Appellees—its specific *grant* of limited Commissioner Bank powers over newly-regulated trust companies for only a limited 3-year period (Appellants' Brief, pp. 41-42), its utilization of subsidiary definitional provisions to make certain non-banking companies (but not trust companies) subject to only some of the Commissioner's bank-regulatory powers, without using this established mode of statutory drafting to subject trust companies to those powers (Appellants' Brief, pp.8, 41), and finally, a difference clearly within the clear *legislative purposes* of the 1999 Act

That is, that amendatory Act's legislative history has legislators declaring that its purposes include the *clarification* of "what law governs the regulation and operation of trust companies." (Appellee's brief, p. 55). The clarification was achieved by the Legislature in pointing to seizure when a *state bank's* insolvency threatens depositors (creditors rather than owners of money),[3] T.C.A.

[3]As has been pointed out, such endangerment of depositors rights to their "money" is often a precursor to the bank's hopeless insolvency, as a consequence of which the insolvent bank *will not be receiving any further moneys,* except through liquidation of its own assets at a probable loss.

§ 4-2-1502 (c)(1), and to liquidation by the Board of Directors without stockholder consent and under the direction of the Commissioner of a *trust company* when the interests of its clients and creditors[4] is threatened by its insolvency and liquidation is in their best interest. T.C.A.. § 45-2-1021.

Recognizing that the Banking Act's only authorization for seizure of a "state bank" without prior due process hearing was impending losses *to depositors*, the Attorney-General asserts that moneys received by a trustee are in fact deposits *with that trustee*. No supporting legal authority is cited, though such citation is required by T.R.A.P. 27.

In asserting that moneys held in trust are "debts"[5] the Attorney-General wrongly states that Sentinel's owner Bates himself referred to the trust receipts as "deposits" (Brief, p. 63) which representation is unsupported by any record reference. Further, a computerized word-search of the entire trial transcript reveals there was no such useage.

The referenced attempt by the Attorney-General to show that trust receipts are "deposits" within the statutory requirement that danger to the interests of "depositors" may be ground for seizing a state bank without the statutorily required prior hearing, no authority is cited in support of this mistaken assumption. To the contrary, the common-law action for "debt" was a type of *legal*

---

[4]As also pointed out, a trust company, even though lacking considerable assets, can carry on, because, as in Sentinel's cases, hundreds of millions of dollars would continue coming in each year because of bond issuer's legal undertakings.

[5]The debtor-creditor relation created by bank deposits being an essential of the Act of depositing T.C.A. §45-1-103. Obviously, "deposits" which create such relationships as bailor-bailee and trust settlor–trustee do not come within this definition, because they require the specification of additional facts that are irrelevant to the debtor-creditor relation..

action commenced at common law in the law courts. See, generally, 1 TENN.JUR., *Debt,* §§ 2-3.

As distinguished from this, it is known to all schooled in the history of equity jurisprudence that the chancery courts *originated* the concept of equitable title and precisely *when and how* this occurred:

The Statute Mortmain outlawed church ownership of property, the devout began deeding property to individuals for the "use" of a church, and the clerical chancellors, schooled in the belief that all property is held by its temporary owners for its eternal owner, [6] enforced these "uses" against the owners of legal titles. Later, the Statute of Uses converted all uses to legal ownership. However, having experienced the benefits of being able to separate the recently-devised "equitable title" from legal title, the "use on a use" was devised for this purpose, and became the trust, always under equity's overseeing powers. Trust obligations were enforced by chancery courts, not law courts, and the settlor's obligations were not enforceable as "debts." See limited description, 76 AM.JUR.2d, *Trusts,* § 4.

As indicated above, the Commissioner, through the Attorney-General has woven argument from many unsupportable statements and some half-truths, and there follow descriptions of some of these abuses of the obligations of argument:

(1) The Attorney-General incorrectly states that this case presents a *Boyce v. Williams* situation in which there are no Sentinel assets to be protected. To the contrary, although the

---

[6]This grew in part from beliefs such as, The earth is the Lord's, and the fullness thereof; the world and all that is therein.

Attorney-General tried to lead the trial court to believe all Sentinel's trust accounts (and moneys related thereto) were gone, it was proven that this was false (Appellants' Brief, p. 28), with this Court able to discern by judicial notice that the Commissioner still held *millions of dollars of trust funds* pertaining to those accounts on a date after the money was represented to the Chancery Court to have left the Commissioner's control.[7]

(2) The Attorney-General incorrectly asserts appellees *admit* (as in the admission of a discovered secret mode of operation) the borrowing of trust funds to liquidate secured claims, when as Sentinel has shown, this was and remains the nation-wide normal, approved manner of temporarily financing the liquidation of well-secured claims (Appellants' Brief, pp. 31-38), the Department had known this for literally *years* without criticism and had condoned it by Departmental approval.

(3) The Attorney-General states that a basis of Sentinel's position is its assertion that the Commissioner misunderstood the trust business, this without citation to the record (Appellee's Brief, p. 65). Such a comment was actually made not by Sentinel, but by the Chancery Court in querying Sentinel's attorney: "Do you think the Commissioner just didn't understand the trust business?", to which Sentinel's counsel replied, "I cannot go into the Commissioner's mind." (R., XIV: 491).

(4) The Attorney-General argues (Brief, 76, n. 293) for the existence of an "administrative

---

[7]Obviously, there was no cash held in relation to the retained defaulted bond issues having negative cash balances after more millions of dollars had been collected (and retained under the Commissioner's control) from collateral liquidation.

receivership," but the only authority cited in support of such a strange thing are cases from Illinois and New York, whose constitutions do not apply to Tennessee, and to which states the stringent provisions of the Tennessee Constitution do not apply.[8]

(5) The Attorney-General makes inaccurate assertions of conflicts within Sentinel's owner Bates' testimony, which a careful examination of the record show do not exist. Among these: Bates testified that Sentinel had recovered all fees and expenses in closed cases, supposedly conflicting with his identification of accounts on which Sentinel itself paid expenses (Brief, p. 38). But these were identified in the referenced pages of the transcript as a case in which a bankruptcy judge *ordered* Sentinel to pay these, and the Namor cases, in which *there was no supporting security* because these were bonds fraudulently issued, upon which Sentinel blew the whistle by declaring the bonds in default and by reporting the fraud to the F.B.I., as summarized in Sentinel's brief (Brief, p. 24).

These and other misstatements could hardly have been made unknowingly.

For the State to disregard the plain language of state statutory terms having clear meaning is inexcusable; for the State to then attempt to mislead an appellate court as to facts and issues, and

[8]Nor is there any showing by the Attorney-General that the constitutions of either of these states has a firm prohibition, as does Tennessee's Constitution, against any member of the executive branch ever exercising any powers properly belonging to the judiciary or the legislature.

to totally disregard its duty to attempt to refute powerful arguments made against it should be unforgivable.

Respectfully submitted,

Carrol D. Kilgore (# 2544)
Attorney for Appellants
227 Second Avenue, N., Fourth Floor
Nashville, TN 37201-1631
Tel. (615) 254-8801

Certificate of Service

It is hereby certified that a copy of the foregoing brief has been mailed this October 28, 2005, postage prepaid, to the following:

JANET M. KLEINFELTER, ESQ.
Financial Division
Attorney-General of Tennessee
425 Fifth Avenue, North
Nashville, Tennessee 37243.

Graham Matherne, Esq.
WYATT, TARRANT & COMBS
2525 West End Avenue
Nashville, TN 37203-1423

Donald Schwendimann, Esq.
306 W. Main Street
P.O. Box 366
Hohenwald, TN 38462